IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 22.6.2006

Coram:

The Hon'ble Mr.JUSTICE S.RAJESWARAN

C.R.P.(NPD) No.679 of 2006

St.Mark's Educational Trust by its
Managing Trustee
Prince Babu Rajendran
143, Radha Nagar Main Road
Chromepet,Chennai
.. Petitioner[First Defendant].

vs.

S.Ashok Kumar .. Respondent[Plaintiff].

Revision Petition filed under Section 115 CPC against the order dated 14.3.2006, passed in E.A. In unnumbered S.R.No.11423/2005 in E.P.No.108/2005, in O.S.No.175/1988 on the file of the District Munsif Court Alandur.

For Petitioner : Mr.N.S.Nandakumar
For Respondent : Mr.R.Subramania Iyer.

ORDER:

The judgment-debtor in the E.P.No.108/2005 in O.S.No.175/1988, on the file of the learned District Munsif Court, Alandur, is the Revision Petitioner before this Court. The respondent herein filed O.S.No.175/1988 before the Sub-Court, Poonamallee for a declaration that the 'B' schedule property mentioned in the schedule is his absolute property and for directing the 1st defendant/Revision Petitioner to put the the decree holder/respondent in vacant possession of the suit property. By judgment and decree dated 31.10.1995, the trial court decreed the suit for title and dismissed the same for possession. The respondent/plaintiff herein alone filed an appeal in A.S.No.383/1996 before this Court and a Division Bench of this court by its elaborate judgment dated 29.3.2005 allowed the appeal and granted the decree for possession also. Against the judgment and decree dated 29.3.2005, the Revision Petitioner filed Special Leave Petition. But the same was also dismissed by the Hon'ble Supreme Court on 13.5.2005. The respondent/decree holder filed E.P.No.108/2005 to execute the decree and after receiving the notice in the execution proceedings, the Revision Petitioner filed an Execution Application under Sec.47 and

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with a prayer to declare that the decree dated 31.10.1995 is null and void and not executable against him. The execution court by order dated 14.3.2006 in unnumbered SR No.11423/2005 in E.P.No.108/2005 rejected the same and challenging the order dated 14.3.2006, the above Revision Petition has been filed by the Revision Petitioner herein.

2. Heard the learned counsel for the Revision Petitioner and also the learned counsel for the respondent. I have also perused the documents filed in support of their submissions.

3. Learned counsel for the Revision Petitioner contended that the execution court has failed to exercise its jurisdiction to decide the issue in accordance with Sec.47 of C.P.C., read with Rule 143 of the Civil Rules of Practice. He further submitted that the Revision Petitioner had no occasion to bring it to the notice of the court during the hearing of the suit and appeal about the fraud played by the decree holder against the courts and other authorities which came to light when he took steps to obey and to give effect to the decree in the suit.

4. Per contra, learned counsel for the respondent submitted that the executing court has rightly rejected the Sec.47 application as the executing court cannot go behind the decree and reopen the matter afresh.

5. It is the case of the Revision Petitioner that he pursued the suit and appeal bonafidely without realising that the respondent herein played premeditated fraud by making and fabricating successive documents and obtained orders suppressing the public records with the calculated intention to cheat the real owner and legally interested persons. Therefore, according to him, the decree in O.S.No.175/1988 is a nullity and unenforceable. It is the revision petitioner's further case that the decree is not executable against the petitioner in view of the inherent defect in the title of the property and also description of the property mentioned in the schedule in the decree. Learned counsel for the petitioner relied on the judgment reported in (2001) 6 SCC 534 (Dhurandhar Prasad Singh v. Jai Prakash University) to contend that objection under Sec.47 about the executability of the decree can be allowed if it is found that the decree is a nullity.

6. In the above judgment, the Hon'ble Supreme Court has elaborately dealt with the power of the executing court under Sec.47 of C.P.C., and held as follows:-

> "23. Under Section 47 of the Code, all questions arising between the parties to the suit in which the decree was passed or their representatives relating to the execution, discharge or satisfaction of decree have got to be determined by the court executing the decree and not by a separate suit. The powers of the court under Section 47 are quite different and much narrower

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than its powers of appeal, revision or review. A first appellate court is not only entitled but obliged under law to go into the questions of facts as well, like the trial court, apart from questions of law. Powers of the second appellate court under different statutes like Section 100 of the Code, as it stood before its amendment by Central Act 104 of 1976 with effect from 1.2.1977, could be exercised only on questions of law. Powers under statutes which are akin to Section 100 of the Code, as amended and substituted by the aforesaid Central Act, have been further narrowed down as now in such an appeal only a substantial question of law can be considered. The powers of this Court under Article 136 of the Constitution of India, should not be exercised simply because substantial question of law arises in a case, but there is further requirement that such question must be of general public importance and it requires decision of this Court. Powers of revision under Section 115 of the Code cannot be exercised merely because the order suffers from legal infirmity or substantial question of law arises, but such an error must suffer with the vice of error of jurisdiction. Of course, the revisional powers exercisable under the Code of Criminal Procedure and likewise in similar statutes stand on entirely different footing and are much wider as there the court can go into the correctness, legality or propriety of the order and regularity of proceeding of the inferior court. It does not mean that in each and every case the revisional court is obliged to consider questions of facts as well like a first appellate court, but the court has discretion to consider the same in appropriate cases whenever it is found expedient and not in each and every case. Discretion, undoubtedly, means judicial discretion and not whim, caprice or fancy of a Judge. Powers of review cannot be invoked unless it is shown that there is error apparent on the face of the record in the order sought to be reviewed.

24. The exercise of powers under Section 47 of the Code is microscopic and lies in a very narrow inspection hole. Thus it is plain that executing court can allow objection under Section 47 of the Code to the executability of the decree if it is found that the same is void ab initio and nullity, apart from the ground that the decree is not capable of execution under law either because the same was passed in ignorance of such a provision of law or the law was promulgated making a decree inexecutable after its

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> passing. In the case on hand, the decree was passed against the Governing Body of the College which was the defendant without seeking leave of the court to continue the suit against the University upon whom the interest of the original defendant devolved and impleading it. Such an omission would not make the decree void ab initio so as to invoke application of Section 47 of the Code and entail dismissal of execution. The validity or otherwise of a decree may be challenged by filing a properly constituted suit or taking any other remedy available under law on the ground that the original defendant absented himself from the proceedings of the suit after appearance as he had no longer any interest in the subject of dispute or did not purposely take interest in the proceedings or colluded with the adversary or any other ground permissible under law."

7. From the above judgment, it is very clear that the powers of the court under Sec.47 are much narrower than its powers of the appeal, revision or review. The executing court can allow objections under Sec.47 of the Code to the executability of the decree if it is found that the same is void ab initio and a nullity, apart from the ground that the decree is not capable of execution under law either because the same was obtained passed in ignorance of such a provision of law or the law as promulgated making the decree in-executable after its passing. The validity or otherwise of a decree may be challenged by getting a properly instituted suit or taking any other remedy under law. The executing court cannot go behind the decree except when the decree is a nullity or is without jurisdiction.

8. Learned counsel for the respondent relied on the judgment of the Hon'ble Supreme Court reported in (2005) 8 SCC 41 (TCI Finance Ltd. v. Calcutta Medical Centre Ltd.) to submit that the Hon'ble High Court should not enlarge the scope of the execution proceeding and treat it as a Full-blown suit. In the above judgment, the Hon'ble Supreme Court held as follows:-

> "7. In support of the appeals, learned counsel for the appellant submitted that a new dimension has been given by the Division Bench. Admittedly, Respondent 1 does not claim any right of ownership over the attached properties. No claims of the nature set forth by Respondent 1 can be examined in terms of Section 47 or Order 21 Rule 58 CPC. By the impugned judgment, the High Court has enlarged the scope of the execution proceedings and has treated it as a full-blown suit without even recording any reason as to how Respondent 1 has any adjudicable interest in the proceedings.

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The question of tenancy of tenancy cannot be decided by the executing court."

"10. The executing court cannot go beyond the decree. It is settled position in law which flows from Section 38 CPC, except when the decree is a nullity or is without jurisdiction. The crucial expression in Section 47 is "All questions arising between the parties to the suit" "or their representatives". Order 21 Rule 54 deals with attachment of immovable property, while Rule 58 deals with adjudication of claims to, or objections to attachment of property. Case of Respondent 1is not covered by Section 47 or Order 21 Rule 54 or Rule 58. The High Court misconceived the nature of claim set up by Respondent 1. Learned Single Judge rightly noted that Respondent 1 was not having independent right to the properties. It found that the right claimed was as assignee under the judgment-debtor. The agreement, if any, in that regard was not produced before the Court and, therefore, the learned Single Judge drew adverse inference. Before the Division Bench, the stand of Respondent 1was that it was a tenant. Without indicating any reason as to how the reasoning of the learned Single Judge was wrong the Division Bench enlarged the scope of the controversy and directed the executing court to decide the question of tenancy, which is legally impermissible."

9. In the light of the well settled legal principles,let me examine the case on hand.

10. It is not in dispute that having suffered a decree, the Revision Petitioner did not file a regular appeal questioning the title of the respondent herein. It is only the respondent who filed an appeal before this court challenging the disallowed portion in the decree. The trial court rendered a finding that the revision petitioner herein is a trespasser and he is a person in possession without any authority. This finding was not at all challenged by the revision petitioner and the same reached its finality. In such circumstances it is not for the revision petitioner herein to contend that the respondent by creating and fabricating documents is thus cheating the true and real owners and legally interested persons.

11. The revision petitioner herein filed S.47 application on the ground that the respondent herein did not have proper title and the documents he filed before the trial court to prove the title are bogus documents. Such kind of plea cannot be allowed to be raised for the first time by the petitioner in Sec.47 application, and if it is allowed to be raised, the same will defeat the very decree itself and in such a case the executing court has to travel beyond the scope of the decree which is not

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permissible, that too at the instance of a trespasser.

12. The court below has considered the entire facts and rightly came to the conclusion that all the documents relied on by the revision petitioner related to his defence in relation to the declaration relief sought for by the respondent herein which was already held against the petitioner. In such circumstances, I do not find any merit in the Revision Petition and the same is liable to be dismissed. Accordingly, the Civil Revision Petition is dismissed. No costs. C.M.P.No.5601/2006 is also dismissed.

Sd/-
Asst. Registrar.

/true copy/

Sub Asst. Registrar.

sks/jbm

To
1. The District Munsif Court, Alandur.
+ 1 CC To Mr.N.S.Nandakumar, Advocate SR NO. 26303
+ 2 CCs to Mr.R.Subramanian Iyer, Advocate SR NO 26527

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